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In the

Supreme Court of the United States

October Term, 1998

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM") submits this brief in support of Respondent American Dental Association.[1/] Beginning 1999 with 113,000 professional members,

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[1/] Pursuant to Supreme Court Rule 37.3(a), *amicus* files this brief with the consent of the parties. Evidence of consent is filed concurrently with this brief. *Amicus* discloses pursuant to

from all 50 states and 80 other countries, SHRM is the leading voice of the human resource profession. SHRM's mission is to lead, represent, guide, and inform human resource practitioners and others interested in human resource issues regarding matters of critical and strategic importance to the workplace.

SHRM's members, on a daily basis, apply the myriad employment laws governing the workplace. However this Court ultimately decides the issue presented here, SHRM members, probably more than any other association of professionals, will be responsible for assessing its impact and designing and implementing whatever human resource programs and policies are appropriate as a result.

SHRM presented testimony before the Senate during the legislative debates on the Civil Rights Act of 1991. SHRM regularly provides the Equal Employment Opportunity Commission with formal comment on regulatory issues as well as informal advice and assistance when requested.

SHRM welcomes the opportunity to file this brief to assist the Court's understanding of the enormous practical effect its decision will have on the workplace. SHRM hopes this Court will adopt a rule of law that will encourage employers to initiate and maintain positive and fair employment practices, furthering the purposes underlying Title VII of the Civil Rights Act of 1964.

SUMMARY OF ARGUMENT

The decision of the U.S. Court of Appeals for the District of Columbia Circuit should be affirmed. The imposition of punitive

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Supreme Court Rule 37.6 that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

damages should be limited to cases in which the employer must be *punished* for egregious conduct. As the court of appeals correctly recognized, a finding that an employment decision more likely than not was based on an illegal criterion, without more, is an insufficient basis for imposing a substantial fine upon an employer. As Respondent argues, the court of appeals's view is consistent with the punitive damages statute, Congress's intent, and decisions of other courts.

SHRM urges this Court to fashion a rule regarding punitive damages consistent with its recent, practical decisions in Title VII cases. Last Term, this Court recognized that the statutory policy of Title VII is best served if employers are recognized for their efforts to discharge their obligations under the statute. In the *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* decisions, the Court created a "safe harbor" from liability in sexual harassment claims for employers that act responsibly to fulfill their obligations under Title VII.

This Court should extend to this case the approach to Title VII taken in *Faragher* and *Ellerth*, by providing employers a safe harbor from liability for punitive damages. When an employer demonstrates its reasonable and good faith commitment to preventing discrimination, and to remedying discrimination should it occur, the employer should not be held liable for punitive damages as a matter of law, even if a jury concludes a particular decision was based on an illegal criterion. Such a rule is consistent with the letter and spirit of the law, as an employer that takes such measures cannot be charged with "egregious conduct," "malice," or "reckless indifference" to federally protected rights. This rule also will encourage employers to prevent employment discrimination and foster early, informal dispute resolution without the need for the courts' involvement.

ARGUMENT

A. FOR THE REASONS STATED BY RESPONDENT, THE COURT OF APPEALS'S STANDARD FOR IMPOSING PUNITIVE DAMAGES UNDER 42 U.S.C. § 1981a IS CONSISTENT WITH THE STATUTORY LANGUAGE AND CONGRESS'S STATUTORY INTENT

SHRM will not burden this Court with duplicative analysis already supplied by Respondent and other *amici* supporting affirmance. SHRM strongly believes Congress did not intend to subject employers to liability for punitive damages in every case where intentional discrimination is established. This result would obtain if Petitioner's position were adopted.

This Court's jurisprudence is clear and consistent: punitive damages are "private fines levied by civil juries to *punish reprehensible conduct* and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (emphasis added); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages are "intended to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from *similar extreme conduct*") (emphasis added). Respondent's argument is consistent with this Court's sound views regarding the extraordinary remedy of punitive damages. Therefore, SHRM endorses the arguments advanced by Respondent in favor of affirming the court of appeals.

B. THE LOW THRESHOLD FOR IMPOSITION OF PUNITIVE DAMAGES ADVOCATED BY PETITIONER AND HER *AMICI* WILL PROMOTE THE FILING OF MERITLESS OR AVOIDABLE EMPLOYMENT DISCRIMINATION LITIGATION IN FEDERAL COURT

1. The Number of Employment Discrimination Claims Filed in Federal Court and Before the EEOC Has Increased Dramatically Since Congress Passed 42 U.S.C. § 1981a As Part of the Civil Rights Act of 1991

Members of the House and Senators who were critical of the compensatory and punitive damages provisions in the Civil Rights Act of 1991 [2/] feared Title VII of the Civil Rights Act of 1964 [3/] would be turned into a general workplace tort law, resulting in a "bonanza" for attorneys. *See, e.g.*, 137 Cong. Rec. H9536 (daily ed. Nov. 7, 1991) (statement of Rep. Sensenbrenner). Their nightmares unfortunately have come true.

Employment discrimination claims are the most common type of case filed in federal courts, with the exception of criminal and prisoner-related cases. *See Administrative Office of the Courts, Judicial Business of the U.S. Courts*, tbl. C-2A (1998). The number of employment discrimination claims filed in federal court has *exploded* since the passage of CRA 1991. Thus, for the 12-month period ending September 30, 1993, there were 12,962 employment discrimination cases filed. For the same period ending in 1997, the

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[2/] Civil Rights Act of 1991, Pub. L. No. 102-1066, 105 Stat. 1072 (codified as amended in scattered sections of 42 U.S.C.) (hereinafter "CRA 1991").

[3/] Civil Rights Act of 1964, tit. VII, 78 Stat. 253, *as amended*, 42 U.S.C. § 2000e *et seq.* (1994 & Supp. II 1996) (hereinafter "Title VII").

number had soared to 23,796. *See id.*

There is no sign that the number of employment discrimination filings will be abated in the foreseeable future. The Equal Employment Opportunity Commission reports the number of administrative charges filed under Title VII increased from 49,584 in fiscal year 1991 to 58,615 in fiscal year 1997. In addition, charges filed under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1994), the vast majority of which allege disparate treatment rather than failure to accommodate, increased from 15,274 in fiscal year 1993 to 18,108 in fiscal year 1997. *See U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1991 Through FY 1997* (visited Jan. 10, 1999) <http://www.eeoc.gov/stats/>. These filings are a harbinger of a continued increase in employment discrimination lawsuits. [4]

If, as urged by Petitioner and her *amici*, this Court holds punitive damages may be assessed in a jury's discretion upon *any* intentional [5] violation of Title VII, the number of filings is sure to continue increasing. The resulting increase in litigation not only will further burden the federal courts' dockets, but also the countless small and medium-sized employers that are subject to Title VII jurisdiction. [6]

Put simply, employers of limited resources, facing exposure to punitive damages, will pay money out of fear to settle meritless

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[4] The filing of an administrative complaint or "charge" with the EEOC is a condition precedent to filing a civil action under Title VII. *See* 42 U.S.C.§ 2000e-5(f)(1) (1994); *United Air Lines v. Evans*, 431 U.S. 553, 555 n.4 (1977).

[5] *See infra*, n.7.

[6] Employers of more than fifteen employees are covered "employers" under Title VII. *See* 42 U.S.C. § 2000e(b) (1994).

cases. As Senator Dale Bumpers, a Democrat who negotiated the *passage* of CRA 1991, explained candidly:

> I confess that as a country lawyer, I filed lawsuits that did not have an awful lot of merit but that I knew had settlement value. Any honest trial lawyer worth his salt will tell you he has done that. . . . And I can only tell you that as a small businessman . . . a lawsuit againsts [sic] me for $50,000 in punitive damages would have made me go ballistic because I did not have $50,000 nor any place to lay my hands on such a sum.

137 Cong. Rec. S15479 (daily ed. Oct. 20, 1991) (statement of Sen. Bumpers).

Senator Bumpers supported passage of CRA 1991 because he understood plaintiffs would have to sustain "*a heavy burden*" to obtain punitive damages. *Id.* If Petitioner's argument carries the day, this Court will have considerably lightened the plaintiffs' burden by increasing their leverage.

2. The Low Standard Courts Apply to Deny Employers' Motions for Summary Judgment in Title VII Cases Provides a Further Basis for Affirming the Court of Appeals

In tandem with the minimal standard several of the circuit courts apply to motions for summary judgment, the rule advocated by Petitioner will result in substantial hardship to employers. As discussed below, employees easily can evade summary judgment regarding both liability *and* punitive damages even in the *absence* of proof of unlawful intent to discriminate in violation of Title VII.

The plaintiff in a Title VII lawsuit ultimately must prove intentional discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509

U.S. 502, 507 (1993). [7] At present, however, it is possible for an employee to defeat an employer's motion for summary judgment *without* raising a triable issue of fact regarding intent to unlawfully discriminate. Rather, to defeat the motion, the plaintiff simply must establish: (1) he or she was part of a protected class (2) there was an adverse employment decision (3) he or she was otherwise qualified (4) the position was filled by a person not in a protected class (the prima facie case of discrimination), plus (5) the employer's articulated legitimate reason for making the decision was unworthy of belief. [8]

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[7] It should be noted that establishing "intentional" discrimination itself does not impose a heavy burden upon plaintiffs. Employment decisions such as termination of employment or failure to hire inherently are "intentional." To prove intentional *discrimination* the employee must show a discriminatory motive merely was a "motivating factor" behind the employment decision, "even though other factors motivated the decision." 42 U.S.C. § 2000e-2(m) (1994). Thus, unlawful motivation need not be the *only* reason for the decision, nor must the employee prove the decision would not have occurred "but for" the protected classification. *See id.*

[8] *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1289-90 (D.C. Cir. 1998); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159 (10th Cir.), *cert. denied*, ___U.S.___, 119 S. Ct. 617 (1998); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert. denied*, ___U.S.___, 118 S. Ct. 685 (1998); *Sheridan v. E.I. DuPont de Nemour & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc*), *cert. denied*, ___U.S.___, 117 S. Ct. 2532 (1997); *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 682 n.5 (7th Cir. 1996). *But see Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, ___U.S.___, 118 S. Ct. 1341 (1998); *Rhodes v. Guiberson Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994).

Put another way, if an employer does not provide the full and complete reason for employment action taken against an employee or applicant, its motion for summary judgment likely will be denied. Thus, a plaintiff may defeat a motion for summary judgment even in the absence of proof that the *real* reason for the decision was intentional unlawful discrimination.

In a perfect world, it certainly could be argued that employers always should provide applicants and employees with complete reasons for their employment decisions. But an employer may not have been completely candid with an employee or applicant for a host of reasons *having nothing to do with Title VII*, *e.g.*, to avoid hurting the applicant's or employee's feelings or to avoid an unpleasant conflict.[9] Yet, under Petitioner's construction of 42 U.S.C § 1981a (1994), the employer that tries to avoid, for example, arguments over the employee's performance not only will lose a motion for summary judgment on liability for unlawful discrimination, but also the jury will be permitted to consider awarding *punitive damages*.

The instant case presents an example of the above scenario. The district court stated:

> While the evidence may have been sufficient to have convinced the jury that Kolstad's candidacy for the position [at issue] was treated cavalierly, and [the male] given a preference from the start, it is insufficient to prove to the Court's satisfaction that her sex or his more likely than not had anything to do with her rejection.

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[9] "Managers, like most U.S. workers, are extremely averse to conflict and will avoid addressing it until it reaches the point of a crisis." Stephanie Reynolds, *Managing Conflict Through a Team Intervention and Training Strategy*, Employee Rel. Today, Winter 1998, at 57.

Kolstad v. American Dental Ass'n, 912 F. Supp. 13, 15 (D.D.C. 1996), *aff'd in part and rev'd in part*, 108 F.3d 1431 (D.C. Cir. 1997), *rev'd*, 139 F.3d 958 (D.C. Cir. 1998) (*en banc*), *cert. granted*, ___U.S.___, 119 S. Ct. 401 (1998). The district court would have granted a motion for a directed verdict had it not considered itself bound by *Barbous v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (permitting the jury to infer unlawful discrimination solely from the rejection of an employer's legitimate business reason as pretextual).

Thus, Petitioner seeks punitive damages for what the district court perceived amounted to, at most, arbitrary (but lawful) conduct, rather than unlawful discrimination. As a practical matter, the "reckless indifference" standard advocated by Petitioner imposes on plaintiffs no burden other than proving an employment decision was based on intentional discrimination.

As the dissent below candidly recognized, Title VII and its "prohibition against discrimination are well known to employers." *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 973 (D.C. Cir. 1998) (*en banc*) (Tatel, J., dissenting). The EEOC recognizes, "[i]n many cases, the evidence that establishes liability will also establish malice or reckless indifference." (Brief of *Amicus Curiae* EEOC at 10 n.5.)

If punitive damages liability may attach to every decision that has negative consequences for an employee in a protected class, sound employer decisionmaking will be significantly inhibited. *Every* employee is in a classification protected by Title VII.[10] As stated, *every* promotion, layoff, and termination decision is an

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[10] For example, all parties and *amici* likely would stipulate every employee is of the male or female sex and, therefore, is protected under Title VII from discrimination based on sex. *See Oncale v. Sundowner Offshore Svcs., Inc.*,523 U.S. 75, 118 S. Ct. 998, 1002-03 (1998).

intentional decision that can give rise to liability for punitive damages.[11] The mere fact that the offending decision is made by a person generally aware of laws against discrimination should not be sufficient to provide plaintiff lawyers with the ultimate litigation weapon: *settlement leverage* in the form of this argument: "You never know what a jury will do with the punitive damages claim." As stated, a jury most likely will never consider the merits of the dispute, as employers will be bullied into settlement of all but the most frivolous claims.

C. EMPLOYERS ACTING REASONABLY AND IN GOOD FAITH TO PREVENT AND REMEDY DISCRIMINATION WITHOUT COURT INTERVENTION SHOULD BE INSULATED FROM LIABILITY FOR PUNITIVE DAMAGES

Last Term, this Court observed in *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S. Ct. 2275 (1998):

> It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations [of Title VII] and give credit here to employers who make reasonable efforts to discharge their duty.

118 S. Ct. at 2292. *See also Burlington Indus. v. Ellerth*, ___ U.S.___, 118 S. Ct. 2257, 2270 (1998).

SHRM urges this Court to hold in the instant case that employers may avoid liability for punitive damages if they take reasonable steps to prevent discrimination and provide avenues for

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[11] *See supra*, n.7.

redress of perceived wrongs. [12] Such employers plainly do not act with "malice" or with "reckless indifference" to federally protected rights, even if a jury concludes that a particular decision was based on a criterion illegal under Title VII.

A "safe harbor" in which employers may take refuge from punitive damages liability is consistent with Title VII and 42 U.S.C. § 1981a, regardless of whether this Court affirms or reverses the decision of the court below. Giving employers credit for their good faith efforts to comply with the law, by reducing the penalties that may be assessed, also is consistent with other federal laws punishing employers and corporations.

1. The "Safe Harbor" Is Consistent with Title VII and 42 U.S.C. § 1981a

Title VII is a "statute meant to influence primary conduct." *Faragher*, ___U.S. at___, 118 S. Ct. at 2292. It is intended to "avoid harm," and *not* "to provide redress" to plaintiffs. *Id. See also Ellerth*, ___U.S. at___, 118 S. Ct. at 2270 (noting Congress's intention "to promote conciliation rather than litigation in the Title VII context"). SHRM's proposal is consistent with Title VII's goal to avoid harm. The best way to avoid discrimination is to prevent

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[12] While *Faragher* was a case involving sexual harassment under Title VII, sexual harassment is "but a form of employment discrimination." *Ellerth*, ___ U.S. at ___, 118 S. Ct. at 2275 (Thomas, J., dissenting). *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-66 (1986). There is no reason to treat harassment based on sex differently from other forms of prohibited discrimination in the terms and conditions of employment.

its occurrence. The safe harbor rewards employers that take preventive measures. [13]

The safe harbor proposal also is consistent with 42 U.S.C. § 1981a. An employer with a policy against discrimination and proof that it is enforced is *diligently respectful* of Title VII, not "recklessly indifferent," much less guilty of "malice" or "egregious conduct." The dissent below agrees with this point of view:

> An employer could thus argue that even though it had been found liable for the discriminatory acts of an employee and ordered to pay compensatory damages to the victim, it should not have to pay punitive damages, because it had undertaken good faith efforts to comply with Title VII—for example, by hiring staff and managers sensitive to Title VII responsibilities, by requiring effective EEO training, or by developing and using objective hiring and promotion standards—thereby demonstrating that it never acted in reckless disregard of federally protected rights.

Kolstad, 139 F.3d at 974 (Tatel, J., dissenting).

Petitioner and some of her *amici* (including the EEOC) recognize the employer's good faith is relevant to the punitive damages inquiry. Arguing this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 130 (1985), supplies the correct analysis of the punitive damages standard, Petitioner states the employer in *Thurston* was not guilty of "reckless disregard"

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[13] While, as Petitioner and her *amici* argue, the prospect of punitive damages also may provide an incentive for employers to take the same preventive measures, they also provide incentive for employees and their attorneys to pursue frivolous claims.

because it "had consulted with counsel about its legal obligations and, at worst, had simply overlooked the challenged aspect of its practices." (Pet. Brief at 19.) The employer's good faith conduct—obtaining legal advice—insulated it from liability.

Interpreting 42 U.S.C. § 1981a, the EEOC stated the following issues are relevant to whether punitive damages should be imposed in Title VII cases: whether the conduct suggests an official policy of discrimination as opposed to the work of a renegade supervisor; evidence that the employer tolerated or condoned the discriminatory conduct over time; and the employer's conduct after it was informed of discrimination. *See U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991* 53-54 (1992). The converse also should be true. If the evidence shows a supervisor's isolated decision rather than an official policy is responsible for discrimination, or if the evidence shows the employer does not have a history of tolerating or condoning discrimination, or if the employer responds promptly and meaningfully to complaints of misconduct, the employer should not be held liable for punitive damages—even if the supervisor's intentional employment decision ultimately is found to be discriminatory.

The brief of *amici curiae* Lawyers' Committee for Civil Rights Under Law, *et al.* is consistent with this approach. It states "a good faith effort to abide by Title VII does not reflect the reckless indifference necessary for an award of punitive damages." (Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law *et al.* at 25.)

While SHRM disagrees with the low standard for liability advocated by Petitioner and her *amici*, SHRM certainly acknowledges the force of Congress's command: employers who "persist in intentional discrimination in the face of well-established federal prohibitions" (Brief of *Amicus Curiae* EEOC at 31) are deserving of punishment in the form of punitive damages. SHRM

firmly believes, however, that, consistent with this command, employers that recognize well-established law and make sincere, good faith efforts to *avoid* intentional discrimination should be given "credit," *see Faragher*, 118 S. Ct. at 2293, for their efforts. This "credit" should take the form of insulation from punitive damages, in the unfortunate event intentional discrimination occurs despite employers' reasonable efforts to prevent it. Such a rule will induce employers to prevent discrimination and to remedy complaints before they arrive on the federal dockets, thereby furthering the goals of Title VII.

In contrast, the rule proposed by Petitioner and her *amici* is inconsistent with *Faragher*'s interpretation of the policy underlying Title VII. For Petitioner would impose punitive damages liability against the employer based on an individual decisionmaker's state of mind alone, without considering the employer's efforts to prevent or cure discrimination and whether the plaintiff availed himself or herself of the employer's anti-discrimination policies and procedures.

2. A "Safe Harbor" Is Consistent with Other Laws Imposing Penalties on Employers and Companies

Punitive damages are analogous to criminal penalties. A safe harbor against imposition of punitive damages is consistent with federal criminal law. The Federal Sentencing Guidelines for organizations [14] provides corporations with "credit" for good faith efforts to comply with our nation's varied and complex criminal laws. The sentencing rules expressly provide for a substantial reduction in a fine if the organization has an effective "compliance

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[14] Federal Sentencing Guidelines Manual § 8 *et seq.* (1998).

program." [15] In addition, the Department of Justice will consider a corporation's compliance program's effectiveness as one of the relevant factors in deciding whether to prosecute a corporation. [16]

An employer's good faith conduct also is a defense to financial liability under other employment laws. For example, the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (1994), provides for substantial monetary penalties against employers that fail to adhere to safety standards. *See id.* § 666. Just as Title VII requires employers to prevent discrimination, the OSHA statute

> requires that an employer do everything reasonable in its power to ensure that its personnel do not violate safety standards. But if an employer lives up to that billing and an employee nonetheless fails to use proper equipment or otherwise ignores firmly established safety measures, it seems unfair to hold the employer liable. To address this dilemma . . . the courts have recognized the availability of the [unpreventable employee misconduct] defense. . . . [¶]To reach safe harbor, an employer must demonstrate that it (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance and (4) effectively enforced the rule whenever employees transgressed it.

P. Gioioso & Sons, Inc. v. Secretary of Labor, 115 F.3d 100, 109 (1st Cir. 1997). *See generally* 1 *R. Ben Hogan, et al., Occupational Safety and Health Act*, § 4.03[6] at 4-73 *et seq.* (1998).

In sum, a "safe harbor" protecting employers in Title VII cases is completely consistent with other laws providing for imposition of monetary penalties. It ensures a blameless entity is not punished unjustly and promotes salutary conduct designed to further the purposes of the legislation at issue. On the other hand, wrongdoers that cannot satisfy the safe harbor requirements are exposed to such exemplary or other damages as may be appropriate.

3. Employers May Choose from a Wide Variety of Resources and Options for Making Reasonable Efforts to Discharge Their Obligations Under Title VII to Prevent Employment Discrimination

Faragher provides employers with some general guidance regarding how to avoid liability for unlawful harassment under Title VII. This Court held employers, to avail themselves of the affirmative defense to certain sexual harassment claims, must show:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
> (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, ___ U.S. at ___, 118 S. Ct. at 2293. These criteria may be applied to claims for punitive damages.

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[15] *Id.* § 8C2.5(f). An effective compliance program includes, *inter alia*, development of compliance standards and effective communication thereof, reasonable steps to assure compliance with the standards, and consistent enforcement of the standards and efforts to prevent future occurrences if violations occur. *See generally* Edward S. Rapier, Jr., *Corporations: The Federal Sentencing Guidelines for Organizations: How They Affect A Civil Practice*, 46 La. B.J., Jun. 1998, at 20.

[16] *See* Rapier, *supra*, at 22.

Employers may obtain from many sources assistance with their efforts to "exercise reasonable care" in preventing illegal discrimination. For example, the EEOC recently issued a comprehensive report on employer "best practices" in an effort to "achieve equal employment opportunity in the workplace." [17]

The report [18] is the product of an extensive survey of private sector employers. The report defined a "best practice" as one that

- complies with the law;
- promotes equal employment opportunity;
- manifests management commitment and accountability;
- ensures management and employee communication;
- promotes noteworthy results; and
- does not cause or result in unfairness.

See Best Practices at 25.

Applying these parameters, the report provides numerous examples of "best practices" for a variety of human resource responsibilities, including recruitment and hiring, promotion and career advancement, terms and conditions of employment, termination of employment, alternative dispute resolution, and management commitment and accountability. *See Best Practices* at 6.

It would unduly burden this Court to list or discuss at length all of the practices compiled by the EEOC. Taking the report as a

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[17] Letter from Hon. Reginald Jones, Commissioner, Equal Employment Opportunity Commission to Society for Human Resource Management (Apr. 7, 1997) (on file with SHRM).

[18] *Equal Employment Opportunity Commission, Task Force Report on "Best" Equal Employment Opportunity Policies, Programs, and Practices in the Private Sector* (1998) (hereinafter "*Best Practices*").

whole, an employer's commitment to equal opportunity and therefore to compliance with Title VII may be evaluated by considering whether the employer has undertaken one or more actions such as:

- Promulgated a zero tolerance policy against discrimination that has been appropriately communicated to employees;

- Provided information to supervisors to help them become knowledgeable about equal employment opportunity issues and concerns;

- Adopted an effective complaint resolution system to address issues as they arise;

- Investigated complaints promptly, fairly, and objectively; and, where appropriate,

- Corrected mistakes that have occurred.

The above is not meant to be an exhaustive list, nor should all employers be required to implement every element of the programs discussed. Indeed, employers differ widely in their financial capabilities to take every conceivable step imaginable to prevent discrimination from occurring. Rather than the mechanical application of a checklist of factors, the critical issue should be whether the employer, based on all the facts and circumstances, has shown its commitment to a discrimination-free workplace. Thus, other employer conduct demonstrating the employer is undeserving of punitive damages could include any of the following:

- Supervisors evaluated in part on their human resource skills, including their commitment to equal employment opportunity;

- The employer's history of resolving complaints internally within the company and the action taken against those who

violate equal employment opportunity standards; and

- Management's consultation with human resource professionals or, as in *Thurston*, employment counsel, before making the challenged employment decision.

The salutary effect of these efforts is beyond cavil. An employer taking such comprehensive measures to comply with Title VII logically could not be called "recklessly indifferent" to Title VII or malicious, even if the employer "intentionally" made a challenged employment decision.

Ironically, the employer's efforts to comply with Title VII actually could *assist* a plaintiff seeking punitive damages, if Petitioner's argument carries the day. Thus, Petitioner argues, punitive damages are "authorized where a defendant knew or should reasonably have realized that its conduct was probably unlawful." (Pet. Brief at 14 (footnotes omitted).) (*See also* Brief of *Amicus Curiae* Association of Trial Lawyers of America at 2-3 (stating "punitive damages should be available in cases where the defendant knew or should have known that its conduct was unlawful".) The employer's dissemination of an equal opportunity policy and provision of anti-discrimination training surely would *foreclose* the employer's argument that the decisionmaker was ignorant of the law. In sum, this Court should not countenance Petitioner's construction of 42 U.S.C. § 1981a, as it would lead to this unfair and absurd result.

CONCLUSION

For the foregoing reasons, *amicus curiae* Society for Human Resource Management respectfully requests this Court to affirm the

decision of the U.S. Court of Appeals for the District of Columbia Circuit.

January 18, 1999

Respectfully submitted,

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APPENDIX

42 U.S.C. § 2000e(b)

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .

42 U.S.C. § 2000e-2(m)

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(f)

(1) * * * If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .

Federal Sentencing Commission Guidelines Manual

§ 8C2.5. CULPABILITY SCORE

(a) Start with 5 points and apply subsections (b) through (g) below.

• • •

(f) Effective Program to Prevent and Detect Violations of Law

If the offense occurred despite an effective program to prevent and detect violations of law, subtract 3 points. . . .

Occupational Safety and Health Act

29 U.S.C. § 666

(a) Willful or repeated violation

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

(b) Citation for serious violation

Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Citation for violation determined not serious

Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each such violation.

(d) Failure to correct violation

Any employer who fails to correct a violation for which a citation has been issued under section 658(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 659 of this title initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

(e) Willful violation causing death to employee

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Giving advance notice of inspection

Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) False statements, representations or certification

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(h) Omitted

(i) Violation of posting requirements

Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $7,000 for each violation.

(j) Authority of Commission to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.